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Nos. 765, 766 and 774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 765

CHARLES L. GREGORY, *et al.*,

Petitioners,

vs.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

No. 766

PAUL E. KERN,

Petitioner,

vs.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

No. 774

ELMO E. ALLEN, *et al.*,

Petitioners,

vs.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

CONSOLIDATED BRIEF OF THE COLUMBIA GAS SYSTEM, INC. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ON PETITIONS FOR WRITS OF CERTIORARI

EDWARD S. PENNEY,
15 Broad Street,
New York 5, N. Y.,
Counsel for Respondent,
The Columbia Gas System, Inc.

CRAVATH, SWAINE & MOORE,
JOHN F. HUNT, JR.,
DAVID MELAMED,
Of Counsel.

March 21, 1959

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DEFINITIONS AND REFERENCES

American, Inland and Kentucky: Respectively, American Fuel & Power Company, Inland Gas Corporation and Kentucky Fuel Gas Corporation, the debtors in the three proceedings under Chapter X* of the Bankruptcy Act in the District Court for the Eastern District of Kentucky.

Post-bankruptcy interest: Interest after the institution of a receivership, bankruptcy or reorganization proceedings; this term is generally used in bankruptcy cases, whether in proceedings for liquidation, reorganization or arrangement.

Citations to the opinions below are to the reproductions thereof contained in Appendix A to the Petition in No. 765.

Emphasis has been supplied to quotations in which emphasis appears.

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*The various Chapters and Sections of the Bankruptcy Act are fully cited in the Table of Authorities and are referred to herein only by original Chapter or Section numbers.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is it the general rule of law that interest on unsecured claims against an insolvent debtor (including a debtor in proceedings under Chapter X of the Bankruptcy Act) ceases to accrue at the institution of bankruptcy proceedings?

2. Was it error or an abuse of discretion for the Court of Appeals to adhere to that general rule (affirming the District Court in that regard) in the circumstances of this case?*

3. Did the Court of Appeals abuse its discretion in refusing to reopen and reconsider determinations "previously, and repeatedly, made" in these reorganization proceedings?**

COUNTERSTATEMENT OF THE CASE

(a) The 1957 Petitions

The questions presented by these Petitions are the same questions which the same Petitioners sought to bring here on certiorari in 1957 (Nos. 241, 325, 336 and 342, October Term 1957; *cert. denied*, 355 U. S. 838). *Then* (1957), the District Court had refused to confirm a plan of reorganization which allowed post-bankruptcy interest to the unsecured Kentucky creditors and had directed the Trustees of the Debtors to prepare a plan which did not allow such

*The foregoing questions are presented by the Petitions in Nos. 765 and 766 (referred to in this Brief as the Gregory-Vanston Petition and the Kern Petition, respectively, and jointly as the Kentucky Petitions).

**The foregoing question is presented by the Petitions in No. 774. That Petition is referred to in this Brief as the Allen Petition.

interest; the Court of Appeals had affirmed that order (one judge dissenting) and certiorari was denied. *Note* (1959), after the Trustees have prepared and filed a plan (the Plan) embodying the fundamental premises established by the 1957 decision; after the detailed and comprehensive statutory proceedings contemplated by the District Court's prior order have been completed with the confirmation of the Plan, and the Court of Appeals has unanimously affirmed the orders of the District Court, the same Petitioners again seek certiorari.

Although, in form, the Petitions seek review of the Court of Appeals' 1959 decision, in every substantial aspect this is (as those Petitions themselves make abundantly clear) a second effort to obtain review of the 1957 decision.*

We will not burden the Court with a statement or an argument as detailed as we made in 1957.

We respectfully refer the Court to our Consolidated Brief in opposition to Petitions Nos. 325, 336 and 342 (October Term, 1957), and our Brief in opposition to Petition No. 241 in that term.

(b) The Salient Facts

The 1959 decision of the Court of Appeals (like its 1957 decision) was a decision which applied, in a Chapter X

*Petitioners attribute this Court's denial of their 1957 petitions to the fact that the 1957 order, although reviewable, was not a final order. While we fully realize that denial of certiorari is in no sense decisional, and that the 1957 order was not technically a "final order", we point out that it was nevertheless an order embodying fundamental plan premises, upon the basis of which a new plan was to be (and has been) prepared. Petitioners' view, that this Court denied certiorari because of nonfinality, attributes to this Court the intent to impose upon the parties, the estate and the courts below the burden and delay of preparing a new plan built on erroneous fundamental premises, District Court proceedings relating to it and another round of appeals to the Court of Appeals—all of this in proceedings which had then already lasted 27 years.

reorganization, to a complicated security structure involving complex intercorporate relationships set against the background of many years of litigation, the well-established rule that unsecured claims do not bear post-bankruptcy interest.

The salient facts are these:

(1)

The Debtors in the three Chapter X proceedings are affiliated corporations; the valuable operating assets and business are owned by Inland; and Inland's stock is owned 72.6% by American and 26% by Kentucky, and the latter's stock in turn is also owned by American. American has assets other than its Inland stock; Kentucky has none.

Respondent, The Columbia Gas System, Inc. (Columbia), holds direct claims against Inland, secured by First and Second Mortgages on the Inland assets.

(2)

The Kentucky Petitioners are unsecured creditors of Kentucky, and are not direct legal creditors of Inland. They seek to recover post-bankruptcy interest from Inland assets. Their rights to recover anything from Inland assets (limited to their principal, as the courts below have held) derive from several previous equitable intercessions in their behalf by the court below, *viz.*: (a) in 1945 the Court of Appeals ordered, in each of the three pending Chapter X proceedings, that the claims of Columbia against the Debtor be subordinated to the claims of other creditors;* (b) in 1951, by which time Inland's assets had become more than sufficient to provide full principal and interest to date of payment on the Inland First Mortgage Bonds

*Columbia Gas & Electric Corporation v. United States, et al., 151 F. 2d 461 (6th Cir. 1945).

and Second Mortgage Debentures owned by others than Columbia, the Court of Appeals declared the public holders of American Notes and Kentucky Bonds to be "quasi-creditors" of Inland, and entitled to share in the residue of Inland assets according to their respective stock interests * and (c) in 1954, when it developed that the 72.6% residue of Inland assets would be more than sufficient to provide for the claims of American's creditors, the Court of Appeals again exercised its equity powers on behalf of Kentucky creditors and directed that the balance of this 72.6% excess not required for American creditors be assigned to payment of Kentucky's "secured" obligations.**

It is this "quasi-creditor" claim of the unsecured Kentucky creditors against the assets of Inland upon which the courts below have refused to award post-bankruptcy interest.

(3)

The successive equitable intercessions referred to above demonstrate that the Court of Appeals is well aware of the breadth of its equity powers. In the 1957 decision it expressly pointed out that under *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215, and *Pepper* v. *Litton*, 308 U. S. 295, it had authority to disallow the claims of Columbia; it said that it had repeatedly declined to do so and

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*In re Inland Gas Corp., 187 F. 2d 813 (6th Cir. 1951). The decision was based on the belief that the Kentucky Bonds were secured by a pledge of the Inland stock (27%) owned by Kentucky and that the American Notes were secured by a pledge of the Inland stock owned by American (72.6%). The belief is true with respect to the American Notes. It was determined after full hearing in 1955, however, that the Inland stock never had been pledged to secure the Kentucky Bonds.

**In re Inland Gas Corp., 211 F. 2d 381 (6th Cir. 1954).

it did so again; and that Columbia was therefore entitled to stand upon its rights as a creditor.*

In its 1959 decision, the Court of Appeals affirmed Judge Ford's orders approving and confirming the Plan which provides for the payment to the unsecured Kentucky creditors (from Inland assets) of the principal amount of their claims, but does not give them post-bankruptcy interest. It did this after hearing again, on briefs and oral argument, the pleas addressed to its equity powers which it had heard in 1957. It said, in effect, that the Plan carried out the intent of its 1957 decision:

> "We are of opinion, further, that Judge Ford appropriately applied the adjudication of this Court in 241 F. 2d 374 with respect to postbankruptcy interest and all other issues before him."**

(4)

While no one can purport to catalog the equitable considerations which may have been weighed by the courts below, derived from their many years of experience in these proceedings, they may properly have included the fact (of which both courts were well aware) that the interests represented by the Kentucky Petitions are almost entirely "seasoned Wall Street speculators" who, upon receipt of the principal amount of their claims alone, will reap very substantial gains. The Court of Appeals referred in 1957, for example, to the interest and prospects in these proceedings of the most vociferous of the Kentucky Petitioners (Kern):

> ". . . Kern was not an original investor in the Kentucky bonds and debentures but began buying

*In re Inland Gas Corp., 241 F. 2d 374, 382 (6th Cir. 1957); Gregory-Vanston Petition App. pp. 23a-24a.

**In re Inland Gas Corp., 262 F. 2d 510, 511 (6th Cir. 1959); Gregory-Vanston Petition App. p. 6a.

> Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors. . . . If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid." (241 F. 2d 374, 376; Gregory-Vanston Petition App. pp. 10a-11a).*

(5)

Now, for the first time in their 29-year history, these proceedings have reached the stage at which a plan of reorganization has been "approved" and "confirmed" by the District Court. During this 29-year period the operations of Inland have produced cash sufficient to pay in full (principal and interest to the date of payment) Inland's First Mortgage Bonds and Second Mortgage Debentures held by others than Columbia—a total payment of $8,104,063. The plan which has now been "approved" and "confirmed" (appeals dismissed by the Court of Appeals) will, when carried into effect, complete payment in cash to the secured American Notes of their principal and interest to the date of payment and will pay the unsecured Kentucky Bonds and Debentures in cash their full principal amount. Columbia, whose First and Second Mortgage claims against Inland for principal and secured interest amount to $5,090,000, will obtain the equity valued by the District Court at $3,060,000.

*The present plan does not involve the risk of "the tax claim" referred to by the Court of Appeals.

ARGUMENT

In Opposition to the Kentucky Petitions

I. THE DECISIONS BELOW DO NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW.

A. Introductory

The 1957 and 1959 decisions of the Court of Appeals adjudicated a very narrow and abstruse point, a point impossible to isolate from the exercise, in the unique situation of this case, of the equitable powers of the bankruptcy court and a point virtually impossible of recurrence. They decided in a Chapter X reorganization, on the particular complex facts here involved, that unsecured creditors of a corporation without assets, who had been determined for equitable reasons to be "quasi-creditors" of an affiliated corporation with assets, are not entitled to post-bankruptcy interest as against a direct secured mortgage creditor of the corporation with assets, whose claims had been subordinated for equitable reasons.

Decisions such as these obviously do not raise any important questions of Federal law. In order to compose plausible petitions for certiorari, Petitioners have been forced to construct a distorted picture of pre-existing corporate reorganization law, which they can say the decisions below disturb.

When the decisions below are viewed in the context of the prior law, correctly stated rather than distorted, it is obvious that they disturb nothing. They simply represent application, to the unique and complicated facts of this case, of legal principles firmly established by decisions of this Court, coupled with a permissible exercise by the court below of its equitable powers in bankruptcy.

B. The Correct Legal Context of the Decisions Below

1. The Rule as to Post-Bankruptcy Interest

That interest stops at the date of bankruptcy is an ancient rule in Anglo-American jurisprudence, 2 Blackstone, Commentaries *488. This Court, per Mr. Justice Holmes in *Sexton* v. *Dreyfus*, 219 U. S. 339, 344 (1911), recognized its fundamental nature:

> ". . . [T]he rule was laid down *not* because of the words of the statute *but as a fundamental principle*. We take our bankruptcy system from England, and we . . . assume that the fundamental principles upon which it was administered were adopted by us when we copied the system . . ."

In *New York* v. *Saper*, 336 U. S. 328 (1949), a straight bankruptcy proceeding, this Court reaffirmed the "fundamental principle" and held the rule applicable to unsecured claims for taxes, even though such claims have a statutory priority. Mr. Justice Jackson, writing for the Court, reviewed provisions of the Bankruptcy Act which were argued to make inapplicable the "fundamental principle" and said:

> ". . . *No provision permits post-bankruptcy interest on other claims in general* or tax claims in particular . . . Tax claims are treated *the same as other debts* except for the first priority of payment § 64(a), 11 U. S. C. § 104(a), and the provision making taxes nondischargeable, § 17, 11 U. S. C. § 37" (336 U. S. at 331-32).*

*The Kentucky Petitions assert that the rule against post-bankruptcy interest reaffirmed by this Court in *Saper* and in its subsequent decision in *United States* v. *Edens*, 342 U. S. 912, is applicable only to tax claims. That assertion is frivolous since (i) the "fundamental principle of the English bankruptcy system which we copied"—that interest on unsecured debts stops at bankruptcy—has long been recognized by this Court as applicable to unsecured debts that are not claims for taxes (*e.g.*, *Sexton* v. *Dreyfus*, 219 U. S. 339 (1911);

There are certain exceptions to the rule; *Saper* referred to two of them and this Court has previously recognized the third:

> (1) "[I]f the alleged 'bankrupt' proved solvent, creditors received post-bankruptcy interest before any surplus reverted to the debtor . . ." (336 U. S. at 330)
>
> (2) "[I]f securities held by a creditor as collateral produced interest or dividends during bankruptcy such amounts were applied to post-bankruptcy interest . . ." (336 U. S. at 330)
>
> (3) If the value of the pledged property is more than sufficient to pay principal, the excess value will be applied toward post-bankruptcy interest on a secured claim. *Ticonic Nat'l Bank* v. *Sprague*, 303 U. S. 406 (1938); *Coder* v. *Arts*, 213 U. S. 223, 245 (1909).

2. Application of the Rule in Corporate Reorganization

After *Saper*, *per curiam* decisions of this Court in 1952 applied the rule against post-bankruptcy interest to proceedings under Chapter X (*United States* v. *Edens*, 342 U. S. 912), Chapter XI (*United States* v. *General Engineering & Mfg. Co.*, 342 U. S. 912), and in a general assignment for the benefit of creditors (*United States* v. *Bloom*, 342 U. S. 912).

The brief for the United States in *Edens* unsuccessfully contended that the "fundamental principle" against post-bankruptcy interest, which had originated in "straight" bankruptcy proceedings, was inappropriate in a reorganization proceeding, that the Section 63 definition of provable

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Thomas v. *Western* [illegible] *o.*, 149 U. S. 95 (1893)) and (ii) the ration[illegible] of *Saper* was [illegible] "Congress *assimilated* taxes to other debts for all purposes, including denial of post-bankruptcy interest", not that Congress *differentiated* taxes from other unsecured debts.

claims did not apply in Chapter X and that the "fundamental principle" violates the "strict priority" doctrine.*

C. Application by the Court Below of These Legal Principles

The decision of the court below affirmed, as fair and equitable, the Plan's provisions that:

(i) the secured Notes of American are entitled to payment of principal and full interest to date of payment ($4,705,597);

(ii) the unsecured Kentucky Bonds and Debentures are entitled to recover remaining unpaid principal from the assets of Inland ($2,466,316), but not post-bankruptcy interest; and

(iii) after such payments, Columbia is entitled to payment of the principal of its direct secured First and Second Mortgage claims against Inland together with post-bankruptcy interest** thereon.

Application of the rule of law against payment of post-bankruptcy interest on unsecured claims clearly justifies denial of post-bankruptcy interest to the unsecured Kentucky Bonds and Debentures. Kentucky Petitioners do

*Brief for United States, pp. 4-5, 8-9, 16-17, 20-21, *United States* v. *Edens*, 342 U. S. 912 (No. 299, 1952).

Courts of Appeals of both the First and Second Circuits have held that "strict priority" does not create a claim for post-bankruptcy interest in reorganization proceedings, *Massachusetts* v. *Thompson*, 190 F. 2d 10 (1st Cir. 1951), *cert. denied*, 342 U. S. 918, *New York* v. *Feinberg*, 204 F. 2d 502 (2d Cir. 1953). The First Circuit decision was rendered in a Chapter XI proceeding at a time when "strict priority" was there applicable; subsequently, amendment of the Bankruptcy Act eliminated the "fair and equitable" requirement from Chapter XI, c. 579, § 35, 66 Stat. 433, effective October 7, 1952.

**Existing values permit recovery of only a portion of such post-bankruptcy interest.

not contend that their claims fall within any exception to the rule against post-bankruptcy interest. Application of the rule of law permitting payment of post-bankruptcy interest on secured claims to the extent of their security clearly justifies the payment of post-bankruptcy interest to the holders of American Notes and to Columbia on account of its secured claims against Inland.

Two facets of the Kentucky Petitioners' challenge to the decision below are contentions that (i) neither American Notes nor Columbia's Inland Bonds and Debentures are secured claims, and (ii) the court's decision to permit recovery by Columbia of secured interest on its Inland Bonds and Debentures resulted from a belief that it did not have equitable power to disallow such interest. None of these objections has a shred of merit or poses any question of importance in Federal law.

1. The Secured Status of the American Notes

The American Notes are fully secured claims because American has assets, of a value in excess of the principal and full interest on the Notes, pledged to secure them. The assets of American, other than the 72.6% of the stock of Inland owned by it, have a value of almost $2,000,000. That Inland stock, for purposes of determining the value of the American Note security, also has substantial value. Clearly the "quasi-creditor" decision of the court below (187 F. 2d 813 (1951)) was not intended to put the public creditors of American or Kentucky in a worse position than they would have enjoyed absent that decision. If quasi-creditor claims against Inland were to be disregarded, Inland, even after payment of full principal of and interest on all claims against it (including Columbia's) would be solvent and the 72.6% of its stock owned by American would have a value of almost $3,000,000. Thus, under normal principles of reorganization law there is a fund of almost

$5,000,000 available to the American Noteholders (an amount more than sufficient to pay to them full principal and post-bankruptcy interest). (Applying the same hypothesis to the Kentucky Bond and Debenture holders, the available fund is significantly less than the principal which the Plan permits them to recover from the assets of Inland.)

2. The Secured Status of Columbia's Inland Bonds and Debentures

The secured status of the Inland Bonds and Debentures as a class is not questioned by the Kentucky Petitioners. The fact that Columbia's claims have been subordinated cannot be asserted to have destroyed their secured status. The court below, the author of the subordinations of Columbia's claims, has determined that Columbia's claims must be considered as "existing" and "valid" (*In re Inland Gas Corp.*, 241 F. 2d 374, 382 (6th Cir. 1957); Gregory-Vanston Petition App. p. 23a). It cannot seriously be contended that the court below was without power to define the affect of subordination on the secured status of Columbia's Inland claims. In its 1957 decision, the court below held that Columbia's claims against Inland are not to be subordinated to the payment of post-bankruptcy interest on unsecured claims against Kentucky, and it pointed to the necessary consequences of that delimitation of the appropriate level of Columbia's subordination *viz.*, that, when such subordination has been carried out, "Columbia is entitled to stand upon its rights as a creditor" and, as a creditor, "is entitled . . . to its rights in the remaining assets" of Inland (*Id* at p. 24a).

3. Awareness of the Court Below of the Full Scope of its Equitable Power

The history of the frequent recourse by the court below to its power to deal as equity requires with rights of credi-

tors and priority of claims is sketched in the Counterstatement of the Case, page 3, *supra*. As noted in that Counterstatement, the court below in its 1957 decision once again made clear that it understood the plenary scope of its equitable powers. To suggest, as do the Kentucky Petitioners, that the decisions below are a result of a failure to appreciate those powers or of a belief that they are limited by the decision of this Court in *Saper*, is simply frivolous.

D. The Kentucky Petitioners' Attempts To Distort the Legal Context of This Case

The Kentucky Petitioners portray the decisions below as having "sweeping impact" upon corporate reorganization law and they blame this on "confusion" resulting from the *Saper* case. The Kern Petition is particularly dramatic:

> "The decision vitiates salient aspects of the Court's landmark decisions in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, and *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510 . . ." (p. 9).
>
> "This has come as a great shock to the financial community . . ." (p. 10).

This is nonsense of a high order.*

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*The financial community and members of the corporate reorganization bar are well aware that "strict priority" requires that a plan make adequate compensation for each of the following, in the order of their priority, before it compensates the next in line: (1) to the extent secured, first mortgage claims and interest to the effective date of the plan; (2) to the extent secured, second mortgage claims and similar interest; (3) unsecured claims and similar interest upon them (by virtue of the solvency exception); (4) preferred stock and, if cumulative, accrued dividends thereon; (5) common stock.

Obviously the unique question presented by the instant case can have no impact on the financial community generally.

The spurious character of Petitioner's effort to inflate the decisions below (and of his assertion of confusion resulting from *Saper*) is well demonstrated by his historical treatment of pertinent reorganization law.

1. Petitioner's Historical Review of Reorganization Law—"Pre-Saper"

Since the basic point which Kern chooses to make is that the decisions below have had "sweeping impact" on the reorganization law applicable to interest on *unsecured* claims, it is essential that he first construct a history of reorganization decisions apparently applicable to such interest. To demonstrate that *Saper* is, unwittingly, the villain, Kern creates his own conception of "pre-*Saper*" reorganization law. He begins this (Kern Pet., p. 15) with the high-sounding pronouncement that:

> "... this Court's pre-*Saper* decisions emphasized the respect to be accorded to post-petition interest in statutory reorganizations."

This amorphous generalization is then followed by a discussion of reorganization decisions of this Court, *every one* of which dealt with interest on *secured* claims. For example, the Kern Petition cites in support of its historical generalization:

***Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510.**

But there this Court held it error to confirm a plan which made provision for *stockholders* of a parent company and no provision for accrued interest on mortgage bonds of its operating subsidiaries. In the *Milwaukee* case referred to next below, this Court itself described this decision thus:

> "In *Consolidated Rock Products* v. *Du Bois*, we held that, under Section 77B, interest on *secured*

claims accrued to the effective date of the plan was entitled to the same priority as the principal" (318 U. S. 523, 546).

***Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523.**

There, as to a *stockholders'* argument that interest could not accrue on mortgage bonds after the date of the petition, the Court referred to its *Consolidated Rock Products* decision (see quotation just above) and held the principle equally applicable under Section 77. The syllabus (318 U. S. 523, 525) states the holding on this point thus:

> "Section 77 does not preclude the accrual of interest on *secured* claims after the date of the filing of the petition for reorganization."

***R.F.C.* v. *Denver & R. G. Western R. R. Co.*, 328 U. S. 495.**

This case has obviously nothing to do with interest on unsecured claims, because such claims were eliminated by the plan (pp. 501-502). This Court, at page 521 said:

> "The effective date of the plan was fixed by the Commission as January 1, 1943. This was in its power. The allocation of the securities took into consideration the interest of the *secured* claims to that date. . . ."

***Ticonic National Bank* v. *Sprague*, 303 U. S. 406.**

This is a landmark case dealing with *secured* interest.*

Whatever bearing these cases have on the amorphous concept of "emphasis" on "the respect to be accorded post-petition interest", Kern's counsel are guilty of the most

*Although the Kern Petition does not include *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, among the cases supporting this generalization, it states at an earlier place that the decision below "vitiates salient aspects" of the *Los Angeles Lumber* case. That case, like the others, dealt with a plan's provision for the secured claims of mortgage bonds as against common stock.

blatant sophistry when they conclude that these pre-*Saper* adjudications added up to the following (Kern Pet., p. 17):

> "In reorganization proceedings, there was no statutory bar to the accrual of interest after the filing of the petition; [*] interest was entitled to the same absolute priority as principal; . . ."

To reach these conclusions, obviously phrased to *seem* applicable to unsecured as well as secured interest, Kern has cited not a single case dealing with interest on *un*secured claims.**

Continuing his sophistry Kern proceeds (p. 17):

> "Neither *Saper*, nor its subsequent extension without opinion to tax claimants in corporate reorganizations (*United [States]* v. *Edens*, 342 U. S. 912) gives any intimation that the Court intended to impair any of the principles previously established."

The "principles previously established" by the cases which the Kern Petition cites were principles applicable to interest on secured, not unsecured, debt.*** We agree that

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*Perhaps this statement escapes outright falsity by the phrase "there was no statutory bar". The principle that interest on unsecured claims stops at the date of bankruptcy is, as this Court has stated, not a statutory one but a "fundamental principle" taken over into our bankruptcy practice at its inception from English bankruptcy law.

**Except for *In re Deep Rock Oil Corp.*, 113 F. 2d 266 (10th Cir. 1940); but see Point II, *infra*.

***As recognized by this Court in *Ticonic Nat'l Bank v. Sprague*, 303 U. S. 406, 411-412, the disparity between the rights of secured and unsecured creditors to post-bankruptcy interest arises from, and is rationally supported by, the fact that

> ". . . Secured creditors have two sources of payment for their claims—the liability of the debtor and the liability of the pledged or mortgaged assets. One is personal, the other in rem. The liability in personam of the [debtor] gives rise to a claim in rem against the free assets in the hands of the receiver; the claim in rem against the security continues as a claim in rem against that same security. With respect to the former the secured creditors have merely the same rights as any

neither *Saper* nor *Edens* intimates an intention to impair these principles. We go farther: they did not in fact impair them.

2. Petitioner's Historical Review Continued—Post-Saper

The necessary next step in Kern's argument is to show that *Saper* upset previous reorganization law. Under the heading "Confusion in Lower Courts Since *Saper*", (Kern Pet. p. 18) he proceeds* with a catalog of lower court decisions apparently intended to show the magnitude of the alleged "confusion".

Of these decisions, five deal with claims for taxes.** They clearly apply the rule against post-bankruptcy interest to tax claims (except *Marcalus*, which with equal clarity applies the "solvency" exception). They give effect to *Saper* within the narrow confines to which Petitioners them-

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general creditor, and in so far as dividends are paid to secured creditors from free assets, they share ratably with the unsecured creditors, and their claims bear interest to the same date, that of insolvency. . . . But to the extent that one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors, which cannot be affected by the principle of equality of distribution . . . and interest accruing after insolvency may not be withheld on account of that principle."

Clearly, these considerations are just as applicable in reorganization as in liquidation proceedings.

*After first reiterating his underlying sophistry (Kern Pet. p. 18):

"Despite this Court's clear refusal in the *Milwaukee* case (318 U. S. 523, 546) to accept the theory that the reorganization statutes do not permit the accrual of interest after the filing of the petition . . ."

As we have pointed out above, the *Milwaukee* case plainly and expressly related to interest on secured bonds.

**_State of New York_ v. _Feinberg_, 204 F. 2d 502 (2d Cir. 1953); _Sword Line_ v. _Industrial Commissioner of New York_, 212 F. 2d 865 (2d Cir. 1954); _National Foundry Co._ v. _Director of Internal Revenue_, 229 F. 2d 149 (2d Cir. 1956); _Marcalus Mfg. Co., Inc._ v. _United States_, CCH Bank. L. Rep. ¶ 59,403 (Ct. Cls. January 14, 1959); _Columbia Aircraft Company_ v. _United States_, 163 F. Supp. 932 (S. D. N. Y. 1958).

selves would limit it by their argument that it only applies to tax claims. They have no bearing on Kern's thesis that *Saper* has upset reorganization law generally. They show no confusion.

Two other of the cited cases apply (with no trace whatever of "confusion") the recognized exceptions to the rule that interest stops at the date of bankruptcy: *Eddy* v. *Prudence Bonds Corp.*, 165 F. 2d 157 (2d Cir. 1947), the secured claims exception;* and *In re F. P. Newport Corp.*, 123 F. Supp. 95; *appeal dismissed*, 216 F. 2d 344 (9th Cir. 1954), the solvency exception.**

In *Palo Alto Mutual Savings & Loan Association* v. *Williams*, 245 F. 2d 77 (9th Cir. 1957), Judge Denman concluded that in *Beecher* v. *Leavenworth State Bank*, 192 F. 2d 10 (9th Cir. 1951), he had misread this Court's *Vanston* opinion as not permitting the exception that *secured* creditors can recover post-bankruptcy interest from the proceeds of the sale of their security. But neither *Palo Alto* nor *Beecher* indicates the slightest doubt as to the rule applicable to *un*secured interest, namely, it stops at date of bankruptcy.*** Similarly, *In re Magnus Harmonica Corp.*, 262 F. 2d 515 (3rd Cir. 1959), dealt with application of the exception available to secured creditors, and indicated no doubt as to the rule as to unsecured creditors.****

**Held*, senior lienors should be paid post-bankruptcy interest prior to junior lienors if the income from or value of the collateral is sufficient to pay such interest.

***Held*, surplus proceeds from sale of bankrupt's estate should be applied to interest on unsecured debt, before being repaid to the bankrupt.

***Judge Denman expressly attributes his error to misinterpretation of *Vanston* v. *Green*, 329 U. S. 156 (1946) and in no wise to *Saper* or *Edens*.

****In *Magnus*, the court held in a complex situation, involving "factoring" charges, that where the factoring creditor's claim against the bankrupt (secured) included large amounts of pre-bankruptcy interest on interest, and large overcharges (no longer contestable) for prebankruptcy interest erroneously computed, the court, in exercise

This ends the Kern Petition's list of post-*Saper* "confusion" cases. We can only conclude that—certainly as to the rule applicable to interest on *un*secured claims—the only "confusion" exists in Petitioners'-minds.

II. THERE IS NO CONFLICT BETWEEN THE DECISIONS BELOW AND THE DEEP ROCK DECISION OF THE TENTH CIRCUIT.

The *Deep Rock** subordination of open account claims to the payment of postbankruptcy interest on unsecured notes, as well as to payment of their principal amounts, was expressly rested by the Tenth Circuit on the general principle that prior unsecured claims are entitled to such interest even if payment of it deprives holders of inferior claims of principal. That general principle clearly is untenable after *Saper* and *Edens*, particularly since the authorities relied on by the Tenth Circuit included cases involving interest on *tax* claims which were decided contrary to and prior to *Saper*.** Nor would the fact that the Courts of Appeals for the Sixth and the Tenth Circuits, upon different records, exercised to differing extents their equitable powers of subordination show a conflict between their decisions.

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of its equity powers could refuse post-bankruptcy interest to the creditor. The court in *Magnus*, as the court below in this case, recognized the following principles of general applicability: (1) that interest does not run after the date of bankruptcy; (2) that there is an exception in favor of secured creditors; and (3) that a bankruptcy court has equitable powers to limit or disallow the claims of secured creditors, as the facts of the particular case require.

*In re Deep Rock Oil Corp., 113 F. 2d 266 (10th Cir. 1940), cert. denied, 311 U. S. 699 (1940).

**These were *Board of Commissioners* v. *Bernardin*, 74 F. 2d 809 (10th Cir. 1934) and *McFarland* v. *Hurley*, 286 Fed. 365 (5th Cir. 1923). All the other authorities relied on by the *Deep Rock* opinion were cases involving secured claims: *American & Steel Mfg. Co.* v. *Seaboard Airline Ry.*, 233 U. S. 261 (1914); *Central Trust Co.* v. *Condon*, 67 Fed. 84 (6th Cir. 1895); and *Spring Coal Co.* v. *Keech*, 239 Fed. 28 (4th Cir. 1916).

In Opposition to the Allen Petition

III. THE DECISIONS BELOW, IN REFUSING TO REJECT COLUMBIA'S CLAIMS, DO NOT PRESENT ANY IMPORTANT QUESTION OR CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Allen Petition argues that Columbia's claims should be rejected. They have urged this many times before. We enumerated these repeated prior efforts and the reasons why they had been, and should again be, denied, in our Brief in Opposition to the Allen petition for certiorari in 1957. Without burdening this Court with a repetition, they are, in sum, that: (i) the Court of Appeals, fully aware of its power to disallow Columbia's claims and of all the facts material to the question, repeatedly and unanimously has refused to do so, and (ii) there is lacking any basis for a conclusion that the refusal to repudiate its prior decisions constitutes an abuse of discretion which the powers of this Court should be exercised to correct.

In view of the express and frequent recognition by the Court of Appeals of its power to direct the disallowance of Columbia's claims, the Allen Petition's suggestion that the decisions below conflict with *Pepper* v. *Litton*, 308 U. S. 295, is plainly without merit.

CONCLUSION

The Petitions for Writs of Certiorari (Nos. 765, 766 and 774) should be denied.

Respectfully submitted,

EDWARD S. PINNEY,
15 Broad Street,
New York 5, N. Y.
Counsel for Respondent,
The Columbia Gas System, Inc.

CRAVATH, SWAINE & MOORE,
JOHN F. HUNT, JR.,
DAVID MELAMED,
Of Counsel.

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